INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
1. *P.L. 88-108 and the Arbitration Award*	2
2. *Expiration of the Award*	5
3. *Petitioners' Contempt*	8
4. *The Motion to Disqualify*	12
Argument	13
I. Petitioners Were Not Entitled to A Jury Trial	13
1. *The contempt proceedings were civil in nature*	14
2. *18 U.S.C. § 3692 is inapplicable*	15
3. *The grant of certiorari in No. 78 is not an adequate reason for granting certiorari in this case*	20
II. The Motion To Disqualify Was Properly Denied	24
Conclusion	26

Table of Citations

Cases:

Akron & Barberton Belt R. Co. v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691, 252 F. Supp. 207, 254 F. Supp. 306 (D. D.C., 1966)	7
Akron & Barberton Belt R. Co. v. *Order of Ry. C. & B.*, 253 F. Supp. 538 (D. D.C., 1966)	7
American Airlines, Inc. v. *Air Lines Pilots Ass'n Inter.*, 169 F. Supp. 777 (S.D. N.Y., 1958)	19
Bangor and Aroostook R. Co. v. *Brotherhood of Loc. F. & E.*, 253 F. Supp. 682 (D. D.C., 1966)	7
Berger v. *United States*, 255 U.S. 22 (1921)	24
Brotherhood of Locomotive Engineers v. *National Mediation Board, et al.*, Civil Action No. 2060-66 (D. D.C.)	8

Page

Brotherhood of Loc. Fire. & Eng. v. *Chicago B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964) 5

Brotherhood of Railroad Carmen v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786 (8th Cir., 1965) .. 18

Butte, Anaconda & P. Ry. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 268 F. 2d 54 (9th Cir., 1959) 18

Capitol Airways, Inc. v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (M.D. Tenn., 1961) 6

Chicago River & Indiana R. Co. v. *Brotherhood of Rail. T.*, 229 F. 2d 926 (7th Cir., 1956), aff'd, 353 U.S. 30 (1957) 19

Chicago, Rock Island & P.R. Co. v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y., 1960), rev'd on other grounds, 292 F. 2d 61 (2d Cir., 1961), cert. den., 370 U.S. 936 (1962) 19

Doyle v. *London Guarantee Co.*, 204 U.S. 599 (1907) 14

Eastern Air Lines, Inc. v. *Flight Engineers International Ass'n*, 340 F. 2d 104 (5th Cir., 1965), cert. den., 382 U.S. 811 (1965) 19

Elgin, J. & E. R. Co. v. *Burley*, 325 U.S. 711 (1945) 17, 18

Faubus v. *United States*, 254 F. 2d 797 (8th Cir., 1958) 25

Flight Engineers' Inter. Ass'n v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F. 2d 500 (5th Cir., 1963) 6

Graham v. *Brotherhood of Firemen*, 338 U.S. 232 (1949) 17, 20

Hawaii v. *Kansas*, 258 U.S. 181 (1922) 16

In re Union Leader Corp., 292 F. 2d 381 25

Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963) 3, 10

Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33 (1963) 17

Page

Locomotive Engineers v. *M.-K.-T. Co.*, 363 U.S. 528 (1960) 20
Madden v. *Grain Elevator, Flour & Feed Mill Workers, Etc.*, 334 F. 2d 1014 (7th Cir., 1964) 16
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (1964), *cert. den.*, 379 U.S .817 (1964) 5, 19
Missouri-Illinois R. Co. v. *Order of Railway Conductors*, 322 F. 2d 798 18
Mitchell v. *Barbee Lumber Co.*, 35 F.R.D. 544 (S.D. Miss., 1964) 16
Norfolk & P.B.L. R. Co. v. *Brotherhood of Rail. Train.*, 248 F. 2d 34 (4th Cir., 1957), cert. den., 355 U.S. 914 (1955) 18
Pan American World Air. v. *Flight Eng. Inter. Assoc.*, 306 F. 2d 840 (2d Cir., 1962) 19
Penfield Co. v. *S.E.C.*, 330 U.S. 585 (1947) 14
Pennsylvania Railroad Co. v. *Transport Wkrs. Union*, 202 F. Supp. 134 (E.D. Pa., 1962) 18
Pennsylvania Railroad Co. v. *Transport Workers Union*, 191 F. Supp. 915 (E.D. Pa., 1960), aff'd, 280 F. 2d 343 (3d Cir., 1960) 18
Philadelphia M. Tr. Ass'n v. *International Long. Ass'n. L. 1291*, 368 F. 2d 932 (3d Cir., 1966) cert. granted, No. 78, O.T. 1967 ..... 20, 21, 22
Pullman Co. v. *Order of Railway Conductors & Brakemen*, 316 F. 2d 556 (7th Cir., 1963) 18
Railroad Trainmen v. *Akron & Barberton Belt R.R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (D.C. Cir., 1967) 5, 7, 10
Railroad Yardmasters v. *Pennsylvania Railroad Co.*, 224 F. 2d 226 (3d Cir., 1955) 19
Railway Clerks v. *B. & O. R. Co.*, 384 U.S. 238 (1966) 17
Rutland Railway Corp. v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21 (2d Cir., 1962) 6
Schauffler v. *Local Intern. Longshoremen's Ass'n*, 189 F. Supp. 737 (E.D. Pa., 1960) rev'd in part on other grounds, 292 F. 2d 182 (3d Cir., 1961) 16

	Page
Shillitani v. *United States*, 384 U.S. 364 (1966)	14, 15
Southern Ry. Co. v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127 (D.C. Cir., 1964)	19
Telegraphers v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960)	17
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957)	16
Trainmen v. *Chicago, R. & I. R. Co.*, 353 U.S. 30 (1957)	17, 18
Trainmen v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944)	17, 18
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966)	25
United States v. *Mine Workers*, 330 U.S. 258 (1947)	14, 15, 16, 19
United States v. *Shipp*, 203 U.S. 563 (1906)	16
Virginian Ry. v. *Federation*, 300 U.S. 515 (1937)	17
Walker v. *City of Birmingham*, — U.S. —, 35 Law Week 4584 (1967)	16
Western Air Lines v. *Flight Engineers Internat'l Ass'n*, 194 F. Supp. 908 (S.D. Cal., 1961)	18

Statutes:

Labor Management Relations Act	22
Norris-LaGuardia Act	15, 20, 22, 23
P.L. 88-108, 77 Stat. 132	2, 3, 4, 5, 16
Railway Labor Act	3, 4, 5, 14, 17
18 U.S.C. § 3692	13, 15, 16, 20, 22, 23
28 U.S.C. § 144	12, 24

Miscellaneous:

Hearings on H.J. Res. 565, 88th Cong., 1st Sess.	3, 4
Hearings on S.J. Res. 102, 88th Cong., 1st Sess.	3, 4
S. Rept. No. 459, 88th Cong., 1st Sess.	4
75 Cong. Rec. 5499	17
109 Cong. Rec. 15279, 15281	6
Stern & Gressman, *Supreme Court Practice*	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 353

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND H. E. GILBERT, *Petitioners*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases ¶ 11,914. The opinion of the District Court relating to assessment of the coercive civil contempt fines incurred by petitioners (JA 204-206) is reported at 255 F. Supp. 476. An opinion of the District Court reported at 253 F. Supp. 682, although largely devoted to other matters, sets forth in footnote 5 (253 F. Supp., at

689-690), that Court's reasons for denying the motion to disqualify for bias and prejudice.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition. With respect to the statements in the footnote on page 2 of the petition, we note our view that the case involves a civil, rather than a criminal, contempt fine and that the petition could be filed at any time within the 90-day period allowed for petitions from judgments by a court of appeals in civil cases.

Questions Presented

1. When fines are imposed in a civil contempt proceeding conditioned upon failure to terminate the contempt by a specified future time and the contempt is not so terminated, does a proceeding after termination of the contempt to assess and collect the fines so imposed constitute a criminal contempt proceeding?

2. Whether 18 U.S.C. § 3692 requires a jury trial in any contempt proceeding arising out of disobedience of an order temporarily restraining strikes in violation of the Railway Labor Act and, if so, whether it requires a jury trial in a civil contempt proceeding?

3. Whether a motion to disqualify the trial judge and an accompanying affidavit filed pursuant to 28 U.S.C. § 144 were legally sufficient to require the judge to disqualify himself and, if so, whether they were timely, whether they were properly certified and whether petitioners have waived their rights under the statute?

Statement of the Case

1. *P.L. 88-108 and the Arbitration Award.* In November of 1959, most of the nation's Class I railroads served five

unions representing their operating employees with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains.[1] In September of 1960, those unions served the railroads with Section 6 notices of various counterproposals. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, the President proposed legislation and the Congress responded by enacting P.L. 88-108 (77 Stat. 132). The bill proposed by the President[2] provided for regulation by the ICC of all issues raised by the 1959 and 1960 Section 6 notices, through interim rules that would "remain operative until the parties reach agreement regarding the matter involved, or if no agreement is reached, for two years following the date the interim rule goes into effect." The bill did not contain any provision for disposition of the Section 6 notices. Rather, it provided for "continued collective bargaining" upon those notices and that, if no agreement was reached prior to expiration of the ICC rules, the President should "make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended." In the committee hearings, which related only to the President's bill, the Secretary of Labor con-

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[1] In addition to the petitioner Brotherhood of Locomotive Firemen and Enginemen (BLF&E), the notices were served on the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Railroad Trainmen (BRT), the Switchmen's Union of North America (SUNA) and the Order of Railway Conductors & Brakemen (ORC&B).

[2] Hearings on H.J. Res. 565, 88th Cong., 1st Sess., at 1-3; Hearings on S.J. Res. 102, 88th Cong., 1st Sess., at 1-3.

firmed that the Section 6 notices would continue outstanding during the period of ICC regulation, that the parties would be required to continue bargaining with respect to those notices, that upon the expiration of the period of ICC regulation the parties once again would be in a position to resort to self help (if no agreement had been reached) since the "major" dispute procedures of the Railway Labor Act had been exhausted with respect to those notices, and that in such an eventuality an extension of the legislation almost certainly would be recommended.[3]

It was in this context that representatives of the railroads assured the committees that, if the President's bill was enacted, they would continue bargaining with the unions in an effort to resolve the dispute created by the outstanding 1959 and 1960 Section 6 notices. See Petition, at 4-5. The Congress, however, rejected the approach proposed in the President's bill. The Congress preferred "to provide for a complete solution which would terminate the dispute at this time" and thus avoid the possible "necessity for a resumption of congressional activity in a few months time."[4] And, it sought to achieve this objective by adopting the "time-tested provisions of the Railway Labor Act"[5] instead of resorting to interim ICC regulation. P.L. 88-108, therefore, provided that the two major issues in dispute should be submitted to a board of arbitration (subsequently known as Arbitration Board No. 282), and (§ 3) that the Award of that board should "constitute a complete and final disposition" of the portions of the Section 6 notices raising those issues. The statute also provided (§ 4) that the arbitration should "be conducted pursuant to sections 7 and 8 of the Railway Labor Act" and that "the board's

[3] See, *e.g.*, Hearings on H.J. Res. 454, *supra* at 59-60, 64, 65, 69, 107; Hearings on S.J. Res. 102, *supra* at 54, 55-56, 61-81.

[4] S. Rept. No. 459, 88th Cong., 1st Sess., at 10.

[5] S. Rept. No. 459, *supra* at 3.

award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act." Arbitration Board No. 282 and its Award did comply with these and other requirements of the statute. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & R. Co.*, 225 F. Supp. 11 (D.D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

Very generally, that part of Award 282 relating to the use of firemen (which concerned the BLF&E and the BLE) modified the carriers' existing rules so as to permit the elimination of up to 90% of the firemen's positions in freight and yard service, subject to certain protective provisions for existing employees; firemen with more than 10 years seniority were to continue to receive engine-service employment, while firemen with lesser seniority could be offered comparable jobs or separated from employment upon the payment of a generous separation allowance. The Award also contained provisions modifying the carriers' existing rules governing train crew consist, but they directly concerned the other three unions.

2. *Expiration of the Award.* Section 4 of P.L. 88-108 provided that the Award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Award 282 provided for a two-year period.

Under the Railway Labor Act, however, the rates of pay, rules or working conditions established by an agreement or an arbitration award do not cease to apply upon the termination date specified in the agreement or award, but continue to apply until changed pursuant to the "major" dispute procedures of the Act. *Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (p. 19,002) (D.C. Cir., 1967); *Manning*

v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964). The purpose and effect of a termination clause is to preclude one party from requiring the other to bargain upon proposed changes in the rates of pay, rules or working conditions, under the "major" dispute procedures of the Act, prior to the termination date. *Flight Engineers' Inter. Ass'n* v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F. 2d 500 (5th Cir., 1963); *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (M.D. Tenn., 1961); see *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21, 36 (2d Cir., 1962), cert. den., 372 U.S. 954 (1963).

Consequently, the railroads understood the Congress to have intended, by rejecting the approach proposed in the President's bill and adopting the "time-tested provisions of the Railway Labor Act," that their rules as modified by or pursuant to the Award should continue to apply after the expiration of the Award until changed in accordance with the Railway Labor Act, and that Section 6 notices proposing changes in such rules could not properly be served until after the expiration of the Award.[6] The BLF&E and the other unions, except the BLE, contended that the rules in effect prior to the Award automatically were restored upon the expiration of the Award. The BLF&E, the BRT and the ORC&B also served Section 6 notices prior to the expiration of the Award proposing changes in the carriers' rules as modified by the Award.

The two-year period of the Award expired on January 25, 1966 insofar as the crew-consist provisions of the Award were concerned, but did not expire until March 31, 1966

[6] Representative Harris, the Chairman of the House Interstate and Foreign Commerce Committee and floor manager of the bill, had a similar understanding, stating that "the issues go back under the regular established procedure of collective bargaining" following the expiration of the Award, 109 Cong. Rec. 15279. See, also, id. at 15281.

insofar as the firemen's provisions were concerned. Thus, while most of the issues raised by this controversy over the effect of the expiration of the Award were similar with respect to both aspects of the Award, they arose first in a suit filed by the railroads against the BRT, SUNA, and ORC&B. That proceeding came before Judge Holtzoff as the Chief Judge of the United States District Court for the District of Columbia had assigned to him all litigation in that Court involving P.L. 88-108 and the Award. While ruling against the railroads on some issues, Judge Holtzoff substantially agreed with the contentions that their rules as modified by the Award continued to apply after the expiration of the Award until changed in accordance with the Railway Labor Act and that the Section 6 notices served during the period of the Award were premature. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691, 252 F. Supp. 207, 254 F. Supp. 306; *Akron & Barberton Belt R. Co.* v. *Order of Ry. C. & B.*, 253 F. Supp. 538. Those rulings were followed by Judge Holtzoff in the subsequent proceeding involving the petitioner BLF&E concerning the effect of the expiration of the Award upon the firemen's provisions of the Award. *Bangor & Aroostook R. Co.* v. *Brotherhood of Loc. E. & E.*, 253 F. Supp. 682.

Cross appeals from all these decisions by Judge Holtzoff were filed by the railroads and the unions, and all such appeals were heard and decided together by the Court of Appeals. *Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (May 12, 1967), supplemental opinion, — F. 2d —, 56 CCH Labor Cases ¶ 12,095 (July 31, 1967). With respect to the principal issues, the Court of Appeals substantially agreed with the railroads' contention that their rules as modified by the Award continued to apply after the expiration of the Award

until changed in accordance with the Railway Labor Act, but held that the unions during the period of the Award could serve and require bargaining upon Section 6 notices proposing changes in such rules effective after the expiration of the Award.

The Section 6 notices served by the BLF&E, on or about November 15, 1965, were divided into three parts identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3." In general, Notice No. 1 proposed to require the use of firemen on almost all trains immediately upon the expiration of the Award; Notice No. 2 proposed to require the railroads to compensate firemen or former firemen for all losses they may have incurred as a result of the application of the Award and otherwise retroactively to nullify all that had been accomplished under the Award insofar as possible; and Notice No. 3 proposed to establish an apprentice training program for locomotive engineers. Judge Holtzoff held both Notice No. 1 and Notice No. 2 to be invalid as well as premature, and the Court of Appeals agreed as to Notice No. 2 but disagreed as to Notice No. 1. The validity of Notice No. 3 (which involves a jurisdictional conflict between the BLF&E and the BLE) was not passed upon by either court, pursuant to a stipulation of the parties reserving that issue for other proceedings.[7]

3. *Petitioners' Contempt.* On March 28, 1966 the District Court entered a temporary restraining order (JA 37-43) prohibiting the BLF&E, its officers, etc. from striking the railroads "over any dispute as to the agreements, rules, regulations, interpretations, or practices to be applied by . . . them upon the expiration of the period during which the Award by Arbitration Board No. 282 shall continue in force . . . ." That order also provided that it would expire

[7] That issue is now pending in *Brotherhood of Locomotive Engineers v. National Mediation Board, et al.*, Civil Action No. 2060-66 (D.D.C.).

on April 5, 1966 unless further extended, and scheduled a hearing on the railroads' motion for a preliminary injunction for April 4, 1966. The order was granted, after counsel for both sides were heard (JA 32-36), upon the basis of an affidavit (JA 15-31) which set forth, among other things, statements by petitioner Gilbert and by other officials of the BLF&E (JA 25-29) threatening a strike if the railroads did not upon the expiration of the Award restore the rules in effect prior to the Award, and that (JA 30-31) the "major" dispute procedure of the Railway Labor Act had not been exhausted with respect to the Section 6 notices served by the BLF&E.

At or about 12:01 a.m. on March 31, 1966, immediately upon the expiration of the Award, the BLF&E struck some 12 of the railroads—the respondents here. To avoid any possible question about the applicability of the March 28 order to that strike, respondents moved for a supplemental order which was entered, after a hearing (JA 59-76), on March 31, 1966. That supplemental order (JA 76-78) specifically required the BLF&E, its officers, etc. to "cease the said strikes and picketing that are now taking place," and included a finding that affidavits filed by respondents "sufficiently demonstrate that the said strikes may relate to a dispute as to the agreements, rules, regulations, interpretations or practices to be applied by the said railroads upon the expiration of" the Award. In addition to relating the commencement of the strike, the affidavits (JA 45-58) also set forth statements by various local officers and members of the BLF&E that the strike was over the refusal of the railroads to do away with Award 282 and use firemen on all trains.[8]

[8] As the affidavits disclosed, some local officials of the BLF&E claimed that the strike was over its Section 6 notices in general or Notice No. 3 in particular, but noted that this was belied by the timing of the strike and by the fact that the BLF&E had not invoked mediation or otherwise

Despite this order specifically restraining continuation of the strike, the strike continued. After an evidentiary hearing upon a Rule to Show Cause (JA 80-137), an order was entered on April 2, 1967 (JA 138-140) adjudging petitioners "guilty of contempt . . . in failing and refusing to comply with [the District] Court's order of March 28, 1966, as supplemented by its order of March 31, 1966," and ordering "that said BLF&E be fined in the sum of $25,000 and H. E. Gilbert be fined in the sum of $2500 if the said contempts have not been terminated by 12 o'clock noon, on April 3, 1966." Similar fines were imposed for each additional day after April 3 throughout which the strike continued.[9] Although counsel for both petitioners and respondents informed the Court that it would be possible for the firemen to return to work by 11 or 12 o'clock on the night of April 2d (JA 136), the Court thus allowed petitioners until noon the next day in which to terminate the strike without incurring the fines imposed, and the amounts of the fines were substantially less than respondents had requested ($500,000 per day as to the BLF&E and $10,000 per day as to Mr. Gilbert). When the strike continued beyond noon of April 3d, respondents obtained a Rule to Show Cause why the amount of the fines should not be increased for any additional days that the strike continued,

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exhausted the procedures of the Railway Labor Act so as to be in a position to strike over those notices. The Court of Appeals stated that the refusal of the railroads to bargain over the notices, even if valid and not premature, merely entitled the union to seek mediation by the National Mediation Board. *Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, *supra*, 55 CCH Labor Cases at p. 19,005. See *e.g.*, *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*.

[9] Although the order in terms imposed such additional fines for each day "or portion thereof" that the strike continued after noon on April 3d (JA 140), Judge Holtzoff subsequently explained (JA 190) that he had intended to impose additional fines only for each additional full day, and that he would adhere to that intention even though counsel for petitioners had not called his attention to the matter at the time the order was signed.

but that Rule was vacated on April 4th after the strike was terminated (JA 141-149).

On April 29, 1966, respondents moved for an order assessing the fines incurred by petitioners under the civil contempt order of April 2, 1966 by reason of their failure to terminate the strike prior to noon of April 3d, filing affidavits showing that the strike had continued for about 12 hours beyond that deadline (JA 155-189). Petitioners filed a memorandum of law in opposition to the motion, but did not file any opposing affidavits (JA 191-194). Hearings on this motion and another matter had been set for June 17, 1966. On June 9, 1966, however, Judge Holtzoff concluded (JA 199-204) that an evidentiary hearing on the motion was unnecessary as the affidavits showing a continuation of the strike beyond noon of April 3d had not been contradicted by other affidavits and petitioners' argument that they were attempting to negotiate with the railroads the terms upon which the men would return to work did not constitute a legal excuse for not obeying the Court's order. Consequently, he entered an order (JA 206-208) assessing fines in the amount of $25,000 and $2,500, respectively, against the BLF&E and Mr. Gilbert.

The Court of Appeals agreed "that mere attempts to further negotiate terms for a return to work" would not "be a compliance with the orders of the District Court," but found "that it is possible that counsel for [petitioners] was urging a more absolute 'substantial compliance,' or an inability to comply, with the District Court's unconditional order to call off the strike and return to work" (Pet., App. A, at 53). Hence, the Court of Appeals reversed the order assessing the fines and remanded the case for a hearing or trial of that issue, which might have a bearing upon whether part of the fines which had accrued should be remitted even if there was not such compliance or inability to comply as to

constitute a complete defense (Pet., App. A, at 52-54). In all other respects, the contested legal rulings by the District Court were affirmed.

4. *The Motion to Disqualify.* On April 22, 1966, the BLF&E filed a motion under 28 U.S.C. § 144 to disqualify Judge Holtzoff (JA 149-150) together with a supporting affidavit executed by Mr. Gilbert (JA 150-153). The only specifications in that affidavit which were relied upon by petitioners in the Court of Appeals read (JA 152) as follows:

> "7. On information and belief, on April 4, 1966, Judge Holtzoff informed the press that fines had accrued automatically because the union remained on strike for about 12 hours after the deadline. Judge Holtzoff said that fines of $27,500 were now due and payable because the strike did not end by noon Sunday. Said statements to the press were made under the restriction that the press not quote Judge Holtzoff directly, but refer only to a court official or officials as the source of said statements.
>
> "8. On April 6, 1966, when the railroads presented an order to Judge Holtzoff vacating the rule to show cause issued April 3, 1966, to increase the fines, Judge Holtzoff not only asserted that fines were in fact due, but actually prompted the railroads to act to force payment (Tr. 2-3). The railroads have announced they will do so."

The portion of the transcript referred to in the second paragraph quoted above is set out at JA 147-148. When counsel for respondents presented to the Court a proposed order vacating the Rule to Show Cause (see p. 11, *supra*), Judge Holtzoff asked if the order served only to vacate the Rule, commenting that "rights may have accrued, and probably have accrued" under the earlier orders. He continued to

note that the question of fines was not before the Court in any event, since it could not act *sua sponte* but only at the instance of a party.

Judge Holtzoff denied the motion to disqualify because of the legal insufficiency of the supporting affidavit (JA 153-154), and the Court of Appeals affirmed (Pet., App. A., at 42-45).

Argument

The judgment below is not final as the Court of Appeals directed a remand of the case for further hearing. As is noted by Stern & Gressman, *Supreme Court Practice* (3d ed., 1962), at 148: "The Supreme Court will not usually grant certiorari to review a non-final judgment . . ., in the absence of some exceptional reason." We shall show that the court below correctly applied settled legal principles to the particular facts of this case, and that the rulings sought to be reviewed do not conflict with decisions of this Court or of a court of appeals. Consequently, there would not be any adequate ground for granting the petition even if the judgment below were final, and certainly there is no "exceptional reason" which would justify review at this time of the non-final judgment entered by the Court of Appeals.

I

Petitioners Were Not Entitled to A Jury Trial

The Court of Appeals affirmed the action by the trial court in entering its contempt order of April 2, 1966 upon the basis of a trial before the court, rejecting petitioners' contention that they were entitled to a jury trial of the issue as to whether they had contemptuously violated the temporary restraining order as supplemented. In so doing, the Court of Appeals held that the contempt proceedings were civil in nature (Pet., App. A, at 46-47), and that 18 U.S.C.

§ 3692 is inapplicable because (1) it applies only to criminal contempt proceedings (*id.*, at 47-49) and "decisively" (2) it does not apply to contempt proceedings growing out of orders prohibiting violations of the Railway Labor Act (*id.*, at 49-50). Each of these rulings is correct.

1. *The contempt proceedings were civil in nature.* Under the order of April 2, 1966, petitioners were adjudged to be in contempt but the fines imposed were conditioned upon petitioners' failure to purge their contempt by complying with the temporary restraining order prior to noon of the next day. Such a conditional fine, having the purpose of coercing compliance with the court's order, undoubtedly is civil rather than criminal in nature. *E.g., Shillitani* v. *United States*, 384 U.S. 364, 368 (1966); *Penfield Co.* v. *S.E.C.*, 330 U.S. 585, 590 (1947); *United States* v. *Mine Workers*, 330 U.S. 258, 303-305 (1947); *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 606-607 (1907). Petitioners "conceded, and indeed argued," in the court below "that this was initially a civil contempt proceeding, both in form and in procedure" (Pet., App. A, at 46), but contend that the proceeding was converted to criminal contempt when the trial court subsequently undertook to determine whether the condition specified in its April 2 contempt order had been complied with and, if not, to assess and collect the fines that accrued under that order.

None of the cases cited by petitioners (Pet., at 20-21) either considers or supports such a contention, and it appears to us to be frivolous on its face. Petitioners' contempt was adjudged in the April 2 order and was not and will not be in issue in the subsequent proceeding. Since the trial court was interested in "compelling compliance" with its temporary restraining order rather than in punishment and was reluctant to resort to imprisonment of petitioner

Gilbert for that purpose (JA 133-134); the April 2 order necessarily imposed coercive civil contempt fines which were conditioned upon a failure by petitioners to purge their contempt by terminating the strike within a specified future period. No fines will be assessed or collected if in the further proceeding petitioners demonstrate that they complied with that condition or were unable to do so in accordance with the principles set forth by the Court of Appeals. If any fines are assessed and collected, that will not be because the fines are any less "conditional" than they were when imposed by the April 2 order but because the condition specified in that order has been breached by petitioners. If the mere fact of assessing and collecting conditional coercive civil contempt fines upon breach of the condition suffices to convert the proceeding into one for criminal contempt, as a practical matter there could be no coercive civil contempt fines since they necessarily would be converted into criminal contempt fines before they could be collected. As the above cited cases and many others show, this is not the law.

2. *18 U.S.C. § 3692 is inapplicable.*[10] Section 3692 of the Criminal Code provides for jury trials in "cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute," with certain exceptions. Section 3692 is a codification of former Section 11 of the Norris-LaGuardia Act (44 Stat. 72). This Court held, in *United States* v. *Mine Workers*, 330 U.S. 258, 298 (1947), that former Section 11 applied only to contempts growing out of alleged violations of injunctive orders which are subject to the Norris-LaGuardia Act. This inter-

[10] There is no constitutional right to a jury trial in civil contempt proceedings. *Shillitani* v. *United States*, 384 U.S. 364, 365 (1966).

pretation has uniformly been applied to former Section 11 as codified in 18 U.S.C. §3692,[11] and its application to Section 3692 has not been disputed by petitioners.

In the opinion of the court below, therefore, the "decisive" reason for holding that petitioners are not entitled to a jury trial under Section 3692 is that the Norris-LaGuardia Act "does not apply to an injunction issued to aid in enforcement of the Railway Labor Act" (Pet., App. A, at 49-50). While petitioners do challenge this holding that Norris-LaGuardia does not apply to injunctions requiring compliance with the Railway Labor Act (Pet., at 25-33),[12] this Court has consistently held "that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458

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[11] See, *e.g.*, *Madden* v. *Grain Elevator, Flour & Feed Mill Workers, Etc.*, 334 F. 2d 1014 (7th Cir., 1964); *Schauffler* v. *Local 1291 Intern. Longshoreman's Ass'n*, 189 F. Supp. 737 (E.D. Pa., 1960), rev'd in part on other grounds, 292 F. 2d 182 (3d Cir., 1961); *Mitchell* v. *Barbee Lumber Co.*, 35 F.R.D. 544 (S.D. Miss., 1964).

[12] The main thrust of Petitioners' argument appears to be that the underlying temporary restraining order was invalid because of the Norris-LaGuardia Act. In the *Mine Workers* case, this Court held that "the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction" where a claim had been raised that Norris-LaGuardia deprived the court of jurisdiction to issue injunctive relief (330 U.S., at 290) and, consequently, that criminal contempt sanctions could be imposed for violation of that order even if it should ultimately be held that Norris-LaGuardia deprived the court of jurisdiction (330 U.S., at 289-295). As the court below noted (Pet., App. A, at 54-55), the rationale of that decision supports the view that the alleged invalidity of the underlying temporary restraining order is not a defense to civil *coercive* contempt fines. See, also, *Walker* v. *City of Birmingham*, — U.S. —, 35 Law Week 4584 (1967); *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922); *United States* v. *Shipp*, 203 U.S. 563, 572-574 (1906). The petition does not expressly take issue with this application of the *Mine Workers* doctrine. In any event, the above-quoted holding in *Mine Workers* provides a complete answer to petitioners' contention (Pet., at 31-32) that a temporary restraining order cannot be issued to preserve the status quo pending a final determination of the Norris-LaGuardia issue. See pp. 19-20, *infra*.

(1957). See, *e.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963); *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 563 (1937).[18]

With regard to "major" disputes over proposed changes in rates of pay, rules and working conditions the Railway Labor Act requires service of a written notice setting forth such proposed changes (45 U.S.C. § 156), conferences by the parties with respect thereto (45 U.S.C. § 152 Second, 156), submission to mediation by the National Mediation Board if not settled in such conferences (45 U.S.C. §§ 155 First, 156), a proffer of arbitration by the Board if its mediation efforts are unsuccessful (45 U.S.C. § 155 First) and submission to an emergency board for investigation and report if such a board is appointed by the President in his discretion (45 U.S.C. § 160). See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945). Once all those procedures have been exhausted without settling the dispute, the parties may resort to self help, including strikes by the union, without violating the Railway Labor Act, but the parties may not resort to self help without violating the mandates of the Railway Labor Act until they have been exhausted. *E.g., Railway Clerks* v. *B. & O. R. Co.*, 384 U.S. 238, 243-244 (1966); *Locomotive Engrs.* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Telegraphers v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960), and *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50

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[18] The legislative history of Norris-LaGuardia demonstrates that the Act was not intended to apply to injunctive proceedings involving alleged violations of the Railway Labor Act. *Trainmen* v. *Chicago, R. & I. R. Co., supra* at 40-41. For example, in response to an inquiry as to whether the Act would "make it possible for lack of an injunction to tie up railroads," Representative LaGuardia replied that the Railway Labor Act "takes care of the whole labor situation pertaining to railroads" so that they could not "possibly come under this" legislation. 75 Cong. Rec. 5499.

(1944), relied upon by petitioners (Pet., App. A, at 27-31) for the proposition that Norris-LaGuardia does apply where a "major" dispute is involved, involved situations where the "major" dispute procedures of the Railway Labor Act had been exhausted (see 362 U.S., at 349-351; 321 U.S., at 51-52), and the footnote in the *Chicago, R. & I. R. Co.* opinion partially quoted by petitioners (Pet., App. A, at 29) merely cited the *Toledo* case for its holding that Norris-LaGuardia applies in such a situation in the course of holding Norris-LaGuardia inapplicable to an injunction requiring compliance with the mandates of the Railway Labor Act.[14] But where the "major" dispute procedures have not been exhausted, compliance with those procedures may be required, *Elgin, J. & E.R. Co.* v. *Burley, supra* at 725, and the courts consistently have held that Norris-LaGuardia does not deprive them of jurisdiction to enjoin a strike over a "major" dispute prior to the exhaustion of such procedures. *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45-46 (4th Cir., 1957), cert. den., 355 U.S. 914 (1955); *Pennsylvania Railroad Co.* v. *Transport Wkrs. Union*, 202 F. Supp. 134, 137 (E.D. Pa., 1962); *Western Air Lines* v. *Flight Engineers Internat'l Ass'n*, 194 F. Supp. 908, 910-911 (S.D. Cal., 1961); *Pennsyl-*

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[14] Of the railroad cases cited in footnote 22, page 28 of the petition, the injunction sought in the *Butte* case did not seek to require utilization of Railway Labor Act procedures, 208 F. 2d, at 60; the *Chicago & N.W.* case held Norris-LaGuardia inapplicable and enjoined a strike over a "minor" dispute, 354 F. 2d, at 792-796; the *Missouri-Illinois* case involved a "major" dispute in which the procedures of the Railway Labor Act had been exhausted, 322 F. 2d, at 798, as did the *Pullman Company* case, 316 F. 2d, at 559, 563; and the *Rutland* case involved a "minor" dispute, 307 F. 2d, at 30-34. The *Butte* (p. 58), *Missouri-Illinois* (p. 796), *Pullman Company* (p. 563) and *Rutland* (pp. 31-32) cases recognized, *in dicta*, that the courts may compel compliance with the "major" dispute procedures of the Railway Labor Act when those procedures have not been exhausted with respect to a "major" dispute. The case cited in footnote 23 on page 29 of the petition involved a "major" dispute in which the procedures of the Act had been exhausted, 357 F. 2d, at 153.

vania Railroad Co. v. *Transport Workers Union*, 191 F. Supp. 915, 921 (E.D. Pa., 1960), aff'd., 280 F.2d 343 (3d Cir., 1960); *Chicago, Rock Island & P. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D. N.Y., 1960), rev'd on other grounds, 292 F.2d 61 (2d Cir., 1961), cert. den., 370 U.S. 936 (1962); *American Airlines, Inc.* v. *Air Lines Pilots Ass'n Inter.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958).[15]

The temporary restraining order in the instant case was issued and supplemented upon the basis of affidavits showing that the BLF&E threatened to and did strike the railroads because of their refusal, upon the expiration of Award 282, to reinstate their prior rules governing the use of firemen and that the BLF&E had not exhausted the "major" dispute procedures of the Railway Labor Act with respect to Section 6 notices proposing such action. While that order was intended to preserve the status quo pending hearing and determination of the issues thus presented, including the union's claim that Norris-LaGuardia deprived the court of jurisdiction to issue injunctive relief, this Court established in the *Mine Workers* case that Norris-LaGuardia does not apply to prevent the issuance of such a "restraining order for the purpose of preserving existing conditions pending a decision upon its own juris-

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[15] Many other cases have stated in *dicta* that Norris-LaGuardia is inapplicable in such circumstances. *E.g., Eastern Air Lines, Inc.* v. *Flight Engineers International Ass'n*, 340 F. 2d 104, 106 (5th Cir., 1965), cert. den., 382 U.S. 811 (1965); *Pan American World Air.* v. *Flight Eng. Inter. Assoc.*, 306 F.2d 840, 846 (2d Cir., 1962); *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail. T.*, 229 F. 2d 926, 930-931 (7th Cir., 1956), aff'd, 353 U.S. 30 (1957). And, the courts have held that in the converse situation, where a carrier has not exhausted the "major" dispute procedures of the Railway Labor Act, Norris-LaGuardia does not bar an injunction against the carrier. *E.g., Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964), cert. den., 379 U.S. 817 (1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955).

diction." See fn. 12, p. 16, *supra*. Thus, the courts frequently have issued temporary restraining orders and preliminary injunctions prohibiting strikes or other acts allegedly in violation of the Railway Labor Act, pending a final determination of those allegations. See, *e.g.*, *Locomotive Engineers* v. *M.-K.-T. Co.*, 363 U.S. 528 (1960); *Graham* v. *Brotherhood of Firemen, supra;* and the cases cited on p. 19, *supra*.

Consequently, we submit that the court below was clearly correct in holding the Norris-LaGuardia Act to be inapplicable and, concomitantly, in holding that 18 U.S.C. § 3692 did not apply to the contempt proceeding.

The court below also held that a jury trial was not required by 18 U.S.C. § 3692 because that statute applies only to criminal contempt proceedings, as is indicated by its inclusion in the criminal code. In addition to being supported by the authorities discussed in the opinion below (Pet., App. A, at 48-49), that alternative holding also accords with an alternative holding in *Philadelphia M. Tr. Ass'n* v. *International Long. Ass'n. L. 1291*, 368 F.2d 932, 934 (3d Cir., 1966), cert. granted, No. 78, O.T. 1967, which we discuss below. We are not aware of any decisions to the contrary.

3. *The grant of certiorari in No. 78 is not an adequate reason for granting certiorari in this case.* Petitioners assert (Pet., at 18-21) that certiorari should be granted to review the jury trial issues in this case because those issues are already before the Court in No. 78, O.T. 1967. Even if the issues in the two cases were the same in all important respects, that would not necessarily constitute an adequate reason for granting certiorari in this case, particularly since the Court of Appeals remanded this case for a further hearing and its decision is not final. In any event, there are substantial differences betwen the two cases and a reversal

of the decision below in No. 78 would not require a reversal of the decision below in this case.

We are informed by the Clerk's Office that no response was filed to the petition for writ of certiorari in No. 78. The facts asserted in the petition (pp. 4-5) generally are as follows: A dispute between a union and an employer concerning the interpretation of a provision in their collective-bargaining agreement was submitted to arbitration, and the trial court entered an order enforcing the arbitration award. Subsequently, when a similar dispute arose between the union and another employer, the members of the union commenced a "wildcat" strike despite efforts, conceded to have been "sincere," by the officers of the union both to prevent and then to terminate the strike. The employers reported this fact orally to the trial court, and the union was adjudged to be in contempt of the order enforcing the arbitration award, by reason of the "mass action" of its members, without any pleadings or other papers being filed and without a jury trial being had. The opinion of the court of appeals (368 F.2d, at 933) shows that a fine in the amount of $100,000 per day, effective as of 2:00 p.m. of the day on which the contempt order was entered, was imposed, and this was held to be a coercive civil contempt sanction—a holding that is not questioned in the petition.

From the face of the petition in No. 78, the petitioners appear to have relied most heavily upon the alleged procedural irregularities (pp. 6-8) and upon the holding that the union was responsible for the "mass action" of its members, even though contrary to the orders of the union leaders (pp. 8-11), as grounds for the grant of certiorari. The latter holding was claimed to involve a direct conflict with a decision by another court of appeals. None of those issues, and nothing like them, is involved here. The only question presented in that petition which is also presented

in the petition here concerns the applicability of 18 U.S.C. § 3692, and that was the last ground argued by the petition in No. 78 (pp. 13-17).

In No. 78, the Third Circuit held Section 3692 to be inapplicable because the order enforcing the arbitration award was not "an injunction or a restraining order" to which Norris-LaGuardia applied, but "an order under Section 301 of the Labor Management Relations Act" which did not "involve or grow out of a labor dispute" within the meaning of the Norris-LaGuardia Act. 368 F.2d, at 934. The Third Circuit also held, alternatively, that Section 3692 applies only to criminal contempt proceedings and thus did not apply to the civil contempt proceeding under review. *Ibid.*

While the Norris-LaGuardia issue thus presented in No. 78 bears a superficial resemblance to the Norris-LaGuardia issue here, in fact the two cases involve separate and distinct issues in this regard. Neither petitioners in No. 78 (see p. 16) nor petitioners here attack the settled rule that Section 3692, which originated in Norris-LaGuardia, applies only to contempt proceedings arising out of injunctive orders governed by Norris-LaGuardia. See pp. 12-16, *supra*. Thus, the true issue in No. 78 is whether Norris-LaGuardia applies to orders enforcing an arbitration award under Section 301 of the Labor Management Relations Act, while the true issue here is whether Norris-LaGuardia applies to orders requiring compliance with the mandates of the Railway Labor Act. There is no reason to believe that any ruling by this Court concerning the applicability of Norris-LaGuardia to orders enforcing arbitration awards under Section 301 will in any way involve or affect the established rule that Norris-LaGuardia does not apply to orders requiring compliance with the mandates of the Railway Labor Act. See pp. 16-19, *supra*.

It is true that both the Third Circuit in No. 78 and the District of Columbia Circuit in this case held that Section 3692 does not apply to civil contempt proceedings, and those holdings present identical issues insofar as we can ascertain. But other and different issues are involved in both cases and, as we have noted, the holdings in question merely provided an alternative basis for affirming the denial of a jury trial as both appellate courts primarily relied upon the inapplicability of the Norris-LaGuardia Act to reach that result. Hence, there is no assurance that this Court in No. 78 will reach the issue as to whether Section 3692 is limited to criminal contempt, and a decision of that issue would not necessarily affect the result in this case. If this Court should rule in No. 78 that Section 3692 does not apply to any civil contempt proceeding, such a ruling would merely confirm the correctness of the decision below in this case, while a ruling that Section 3692 may apply to civil contempt proceedings would not upset the denial of the jury trial in this case as that denial still would be adequately supported by reason of the inapplicability of Norris-LaGuardia (including Section 3692 which originated in Norris-LaGuardia) to orders requiring compliance with the mandates of the Railway Labor Act.

We do not believe, therefore, that the pendency of No. 78 is an adequate reason for granting certiorari in this case, and there is no other substantial reason for reviewing the decision below insofar as the jury trial and Norris-LaGuardia issues are concerned. The claimed "nullification" of Norris-LaGuardia (Pet., at 25-33) amounts to no more, as we have shown, than an application to the particular facts of this case of the long-established principle that Norris-LaGuardia does not apply to injunctions requiring compliance with the mandates of the Railway Labor Act, including injunctions prohibiting strikes over "major" disputes

prior to the exhausting of the procedures required by that Act to be followed with respect to such disputes. The power of a district court to enter a temporary restraining order or preliminary injunction preserving the status quo by restraining a strike pending final determination of a claim that Norris-LaGuardia deprives the court of jurisdiction is established by the decision of this Court in the *Mine Workers* case, and the conflict of decisions asserted by petitioners does not exist.

II

The Motion to Disqualify Was Properly Denied

The court below affirmed the denial of the motion by the BLF&E, pursuant to 28 U.S.C. § 144, to require Judge Holtzoff to disqualify himself on the ground that the motion and accompanying affidavit "are legally insufficient to have required the judge to recuse himself in this case" (Pet., App. A, at 44). The weakness of petitioners' argument that this holding was erroneous and presents an important question (Pet., at 22-24) is indicated by the fact that the only case cited by petitioners which in any way involved Section 144 is *Berger* v. *United States*, 255 U.S. 22 (1921); and petitioners do not even purport to claim that the court below, which expressly referred to the *Berger* case, misapplied that decision. All that is involved in this issue is the application of established legal principles, none of which have been questioned by petitioners, to the facts of the particular case. Hence, no "important question in the administration of federal justice" is presented, even if there were reason to believe that some other court might reach a different result in applying the same legal principles to the particular facts.

In any event, we believe that the careful opinion below adequately demonstrates the correctness of the decision

reached (Pet., App. A, at 42-45), and we see no need to repeat what is stated therein. We note, however, the recent holding by this Court that the "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Neither of the specifications relied upon by petitioners (p. 12, *supra*) alleges an "extrajudicial source" for the claimed bias and prejudice or alleges that the statements attributed to Judge Holtzoff were not based on what he "learned from his participation in the case."[16]

Respondents also contended below that, even if the motion and affidavit were legally sufficient, they were untimely (see *Faubus* v. *United States*, 254 F.2d 797 (8th Cir., 1958)) and were defective in that they did not include a certificate of the good faith of counsel (see *In re Union Leader Corp.*, 292 F.2d 381, 385 (1st Cir., 1961)), and that petitioners' waiver of the disqualification issue with respect to another order by Judge Holtzoff in the same case also waived that issue with respect to the contempt order. While the court below did not find it necessary to pass upon those contentions, it did emphasize "that proper certification is a vital and significant requirement to prevent abuse of Sec. 144" (Pet., App. A, at 45), and we believe that each of them provides an additional ground in support of the decision below.

[16] In essence, petitioners complain of alleged assertions by Judge Holtzoff, on April 4 and 6, that the fines were due because the strikes had continued beyond noon of April 3d. That fact was brought to his attention by a motion and affidavit submitted by respondents on April 3 (JA 141-147).

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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